LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 3 1965
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 715

ST. LOUIS MAILERS' UNION LOCAL NO. 3,
Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

JEROME J. DUFF,
Suite 1155—818 Olive Street,
St. Louis, Missouri 63101,
314—MAin 1-3833,
Attorney for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

BLANK PAGE

## INDEX.


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Statement of the Case | 2 |
| Reasons for Granting the Writ | 6 |
| Conclusion | 7 |
| Appendix: | |
| A. Opinion of District Court Below | 9 |
| B. Opinion of Court of Appeals Below | 19 |
| C. Petitioner's Petition for Rehearing in Court of Appeals Below | 30 |


## AUTHORITIES.

### Cases.


| | |
|---|---|
| Minnesota Joint Board, etc. v. United Garment, etc., 338 F. 2d 195 (C. C. A. 8) | 6 |
| Republic Steel v. Maddox, 85 S. Ct. 614, 379 U. S. 650 | 6 |


### Statutes.


| | |
|---|---|
| 29 U. S. C. 185 | 2 |
| 28 U. S. C. 1254 (1) | 2 |

BLANK
PAGE

IN THE

# SUPREME COURT OF THE UNITED STATES.

---

OCTOBER TERM, 1965.

---

No. .....

---

ST. LOUIS MAILERS' UNION LOCAL NO. 3,
Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

---

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

---

St. Louis Mailers Union Local No. 3, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on September 15, 1965, and affirmed by an Order denying Petitioner's petition for rehearing entered on September 30, 1965.

### OPINIONS BELOW.

The memorandum opinion of the District Court is reported in 233 Federal Supplement 529. It is also printed in the Appendix herein (Appendix A, pages 9 to 18).

The opinion of the Eighth Circuit Court of Appeals has not yet been reported. A copy is appended to this petition as Appendix B (Infra, pages 19 to 29).

## JURISDICTION.

The Judgment of the Court of Appeals was entered on September 15, 1965. The petitioner was denied rehearing on September 30, 1965. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646 (1), 62 Stat. 928 (1), 28 U. S. C., Section 1254 (1).

## QUESTION PRESENTED.

Can a federal court arbitrate and decide a contract dispute between a Company and a Union when the labor agreement between the parties contains a mandatory arbitration provision?

## STATEMENT OF THE CASE.

A. This is an action instituted by a certified bargaining representative against an employer in the federal district court in St. Louis, Missouri, under Section 301 of the Labor Management Relations Act, 1947, 29 United States Code, Section 185. The action rests upon a claimed violation of a labor-management bargaining agreement. The courts below recognized federal jurisdiction under 29 U. S. C. 185. The district court below granted summary judgment in favor of the respondent. The Court of Appeals for the Eighth Circuit affirmed the judgment of the district court. A timely petition for rehearing was denied. A copy of the petition for rehearing is appended to this petition as Appendix C (Infra pages 30 to 33).

The petitioner[1] (hereinafter referred to as "Union") is a duly certified labor organization representing news-

[1] St. Louis Mailers Union No. 3, affiliated with the International Typographical Union.

paper mail room employees in the St. Louis, Missouri area. The respondent[2] (hereinafter referred to as the "Globe") was a newspaper publishing company. These parties had entered into a bargaining agreement in December, 1958 (R. 6 to 28), governing the terms and conditions of mail room employment at the newspaper between August 15, 1958 and August 14, 1960. The bargaining agreement was between the Union and an association of St. Louis newspaper publishers consisting of the Globe and the Pulitzer Publishing Co. (The St. Louis Post-Dispatch).

A dispute arose between the Union and the Globe because of the following events which occurred in February, 1959, during the term of the bargaining agreement.

1. The Globe was struck by the St. Louis Newspaper Guild and a picket line set up on February 21, 1959.

2. The mail room employees of the Globe (all members of the Union) honored the Guild's picket line and the Globe suspended publication.

3. Six days later, on February 27, 1959, the Globe announced to all of its mechanical craft Unions (including this petitioner) and employees that the Globe and the Pulitzer Company (the Post) had entered into an agreement whereby the Globe sold to the Post the Globe's building and the bulk of its mechanical equipment. The Globe and Post had also agreed to have all of the mechanical operations necessary to compose, print and mail the Globe to be performed by the Post.[3]

---

[2] The Globe-Democrat Publishing Company was formerly a Missouri Corporation. While these proceedings were pending the Globe corporation was dissolved and all of its assets were taken over by the Herald Company, a New York corporation. The Globe is a daily St. Louis newspaper.

[3] The Globe was and is a morning newspaper. The Post was and is an afternoon newspaper. The agreement provided for the Post to print the Globe at an agreed price.

4. The Globe-Guild strike settled and the Globe commenced publishing on June 1, 1959 (all composing, printing and mailing was performed by the Post).

(a) Since February 27, 1959, the Globe has never owned or manned a piece of mail room equipment.

(b) In August, 1963, the Union filed this suit against the Globe seeking actual and punitive damages from the Globe for breach of Article I, Paragraph 3 of the labor agreement[4] (Exhibit "A", R. 8 and 9).

The Union has contended throughout the litigation below that the agreement announced in February 1959 between the Globe and Post was a change in mail room "process" as that term is used in the labor agreement (see footnote 4) and the Union was entitled to ninety days notice in advance of the sale of the Globe building and hardware to the Post and the resulting discontinuance by the Globe of mail room operations and the termination of Globe mail room employees. The Union complaint (R. 1 through 5) alleges the failure of the Globe to comply with the relevant provisions of the labor agreement.

---

[4] Exhibit A, Contract between parties, Article I, Paragraph 3 (R. 8 and 9):

"3. In the event of the introduction of any process, machinery, or equipment affecting mailing room work as herein defined not in use at the date of this contract is effective or any such process, machinery or equipment used as an evolution of or substitute for current processes, machinery or equipment, the Publisher shall notify the Union of that fact, specifically describing it. Such notice shall be given at least ninety days before installation is to be made. The manner of operating the machines shall be determined by a joint committee representing the parties to the contract. Upon failure to agree upon the points involved, the matter shall be referred to arbitration as herein elsewhere provided. It is mutually agreed that in submitting this question to a fifth man, he shall be governed by the agreement of the parties that none, but journeymen, as defined in this contract, shall be permitted to work on any such process, machinery or equipment, except as provided elsewhere in this agreement for the training of apprentices."

**The Complaint filed by the Union sought money damages for breach of the labor agreement; the Union did not seek (in the District Court) an order of enforcement of the arbitration provision of the labor agreement[5] (R. 10**

---

[5] Exhibit A. Contract between parties, Article III (R. 10 and 11):

"Article III, Disputes and Discharges.

1. If a dispute arises regarding the interpretation of enforcement of any of the provisions of this contract it *shall* be settled in the manner provided for herein. Pending settlement, conditions prevailing prior to the dispute *shall* be maintained.

2. When it becomes evident that there is a dispute as to the interpretation or enforcement of any of the provisions of this contract, the President of the Union or the Secretary of the Publishers' Association *shall* address the other in writing, clearly setting forth the issue in dispute. *The issue as thus raised shall be disposed of as provided for herein.*

3. A Standing Committee of two representatives of St. Louis Newspaper Publishers' Association and a like committee of two representatives of St. Louis Mailers' Union No. 3 *shall* be appointed, and in case of a vacancy or the absence or refusal to act of any such representative, another *shall* be appointed in his place. To this joint committee *shall* be referred *all* controversies growing out of the discharge of an employe and *all* questions which may arise as to the construction to be placed on *any* of the clauses of this contract, *or any alleged violations thereof.* This committee shall meet when *any* question or difference shall have been referred to it for decision by either party to this contract. Should the joint committee be unable to agree within sixty (60) days, then it *shall* call in a fifth member, who *shall* be a disinterested party, *in this way forming a local arbitration board.* If the members of the Joint Standing Committee are unable to agree upon a fifth member of the arbitration board within said sixty (60) days (this time may be extended by mutual agreement), he *shall* be selected by the Senior Judge of the United States Circuit Court of Appeals for the Eighth Circuit. The arbitration board *shall* proceed with all dispatch possible. It *shall* require the affirmative vote of at least three of the five members to decide an issue and *the decision in all cases shall be final and binding on the parties hereto*: provided, the laws of Mailers' Union No. 3 not affecting wages, hours and working conditions and the General Laws of the International Typographical Union shall not be subject to arbitration. In discharge cases joint committees *shall* meet and act as promptly as possible and if unable to agree *shall* call in a fifth member under the foregoing procedure but within ten (10) days (this time may be extended by mutual agreement)". (All emphasis added by petitioner to emphasize the broad form and mandatory nature of this arbitration article.)

and 11, Article III). The District Court below considered and ruled upon the controversy as an action for breach of contract. Pending the de novo submission of this cause on appeal to the Court of Appeals for the Eighth Circuit the Union "shifted gears" in this litigation and prayed for enforcement of the mandatory arbitration clause by the Appeals Court (Petitioner's petition for Rehearing, Appendix C, infra, page 30). Petitioner readily admits that it was asking the Appeals Court to grant relief to the Union, in the form of specific performance of the arbitration provisions, which the Union had not sought until the Union's Reply Brief was filed in the Appeals Court on February 17th, 1965 (Appendix C, infra, page 32).

The Court of Appeals below interpreted the several relevant clauses of the contract applicable to the dispute between the parties and found that the Globe had not breached the contract. The Court of Appeals below did not specifically rule upon the arbitrability of this contract dispute (Appendix B—infra, page 28).

## REASONS FOR GRANTING THE WRIT.

This petitioner was taught by the ruling of this Court in the case of Republic Steel v. Maddox, 85 S. Ct. 614, 379 U. S. 650, and the ruling of the Eighth Circuit Court of Appeals in the case of Minnesota Joint Board, etc. v. United Garment, etc., 338 F. 2d 195, that the dispute between these parties to a labor agreement must be resolved by the terms of the agreement itself. The federal standard requires arbitration of all labor disputes not clearly outside the arbitration clause of the agreement. The petitioner has never waived its arbitration right; the petitioner clearly asserted its claim to that right in the course of this litigation.

Petitioner categorically states that if the District Court or the Appeals Court below would have found in favor

of the Union and decreed accordingly and if the Globe would have timely raised the general rule holding that federal labor policy REQUIRES use of the contract grievance procedure agreed upon by the parties as the mode of redress, this Court would set aside the hypothetical decree in favor of the Union on the authority of Republic Steel v. Maddox. Petitioner states that the federal standard requiring use of the arbitration article was timely raised in the courts below; the petitioner herein had never waived that right and was entitled to its enforcement.

The Court of Appeals has made itself the arbitrator in this case.

The petitioner is entitled to have the dispute herein resolved by invoking the common law of the newspaper industry through the enforcement of the mandatory arbitration method by which these parties agreed to resolve their disputes. We ask this Court to enforce that right.

## CONCLUSION.

For the foregoing reasons, the Writ of Certiorari should be granted. October 26, 1965.

Respectfully submitted,

JEROME J. DUFF,
Suite 1155—818 Olive Street,
St. Louis, Missouri (63101),
314—MAin 1-3833,
Attorney for Petitioner.

## Certificate of Service.

State of Missouri, }
City of St. Louis. } ss.

I, Jerome J. Duff, of counsel for the Petitioner herein, and attorney of record for the Petitioner in the Courts

below, depose that on the 26th day of October, 1965, I served four copies of the foregoing Petition for Writ of Certiorari on the Respondent, as required by Rule 33, Paragraph 1, by personally delivering said copies hereof to Mr. Lon O. Hocker, Attorney of Record for the Respondent, in care of the law offices of Hocker, Goodwin and MacGreevy, 411 North Seventh Street, St. Louis, Missouri (63101).

.....

Jerome J. Duff,

Member of the Bar of the
United States Supreme Court.

## APPENDIX A.

### (Memorandum Opinion.)

(Filed in U. S. District Court on June 12, 1964.)

Plaintiff, a labor organization representing mail room employees, seeks damages for the alleged breach of its collective bargaining agreement with the St. Louis Newspaper Publishers' Association by one of the latter's two members, the defendant Globe-Democrat Publishing Company. The other member of the employer Association was the Pulitzer Publishing Company, publisher of the St. Louis Post-Dispatch. Plaintiff has moved for partial summary judgment on the issue of contract breach, leaving the extent and nature of damages for trial. Defendant denies the breach and defends on the further ground of res judicata. Defendant has moved for summary judgment on both grounds. The material facts necessary to decision are not in dispute.

The claim herein stems from the action of the defendant Globe in contracting and selling its physical properties to the Pulitzer Publishing Company. Pursuant to this contract and sale, the defendant Globe was printed and distributed by the Pulitzer Publishing Company, hereinafter sometimes referred to as the St. Louis Post-Dispatch.

Plaintiff seeks damages only to itself as a labor union and bases its claim exclusively on the alleged breach of Article I, Paragraph 3, of the collective bargaining agreement, in the failure of defendant to give it ninety-days notice before making the sale and contract with the Pulitzer Publishing Company. Jurisdiction is present under § 301 of the Labor Management Relations Act, 29 U. S. C. A. 185. All individual rights of plaintiff's members, who were formerly employed by the defendant Globe were foreclosed and settled by virtue of Cause No. 23483-E,

tried in the Circuit Court of the City of St. Louis, Missouri, which resulted in a judgment for plaintiffs therein (approximately sixty-two individual members of the plaintiff labor organization) on their claims for vacation pay and a judgment for defendant on plaintiff's claims for severance pay under the same collective bargaining agreement before us. That judgment was affirmed by the Supreme Court of Missouri, **Monterosso et al. v. Globe-Democrat Publishing Company**, 368 S. W. 2d 481, cert. den. 375 U. S. 908.

The collective bargaining agreement between plaintiff and the St. Louis Newspapers Publishers' Association, of which defendant Globe was a member, was in effect from August 15, 1958, to August 14, 1960. On February 21, 1959, a strike was begun at defendant's premises by another labor organization, the St. Louis Newspaper Guild, which set up a picket line that continued in effect until May 27, 1959. Plaintiff's members respected the Guild's picket line as they were permitted to do under their collective bargaining agreement, and none reported for work to the defendant from the time the Guild pickets appeared. All of the plaintiffs took employment elsewhere during the period from February 21, 1959, to June 1, 1959. Publication of the defendant Globe-Democrat was resumed on June 1, 1959, following the settlement of the Guild strike.

Most of plaintiff's members thereafter became employees of the St. Louis Post-Dispatch although the St. Louis Post-Dispatch was under no obligation to employ them. All such employees were treated as "new" employees at the St. Louis Post-Dispatch and did not retain their severance and priority rights that had accumulated to them while employed by defendant.

On February 27, 1959, defendant and Pulitzer Publishing Company entered into a contract and executed a deed of conveyance of the building where defendant had for-

merly conducted its business. Defendant likewise executed a bill of sale to the bulk of its mechanical equipment, presses and machinery, including all the equipment used by plaintiff's members in their normal employment. On February 27, 1959, defendant's president and publisher called a meeting of representatives of all of the mechanical crafts, including plaintiff, and read to them a statement, a copy of which had been sent to each of defendant's employees. This statement disclosed the contract with the St. Louis Post-Dispatch for the printing of the defendant Globe and the consolidation of the two newspapers' mechanical operation, "when and if the Guild strike is settled". It was stated therein that "members of the mechanical unions will be employed on a priority basis in the consolidated mechanical operation. If they all cannot be employed, the dismissal provisions of the current mechanical contracts will apply." Sometime in May, plaintiff's members sought severance and vacation pay from defendant. Plaintiff represented its members in their negotiations and prosecuted their claims in the aforementioned state court proceedings, having agreed with defendant to waive the arbitration provisions of the collective bargaining agreement.

Article I of the collective bargaining agreement provides for plaintiff's jurisdiction of the mail room work of the two publishers. Plaintiff asserts that defendant breached Paragraph 3 which reads as follows:

> "In the event of the introduction of any process, machinery, or equipment affecting mailing room work as herein defined not in use at the date this contract is effective or any such process, machinery or equipment used as an evolution of or substitute for current processes, machinery or equipment, the Publisher shall notify the Union of that fact, specifically describing it. Such notice shall be given at least ninety days before installation is to be made. The manner of operating

> the machines shall be determined by a joint committee representing the parties to the contract. Upon failure to agree upon the points involved, the matter shall be referred to arbitration as herein elsewhere provided. It is mutually agreed that in submitting this question to a fifth man, he shall be governed by the agreement of the parties that none but journeymen, as defined in this contract, shall be permitted to work on any such process, machinery or equipment, except as provided elsewhere in this agreement for the training of apprentices."

Plaintiff urges that the defendant's sale and contract for the printing and distribution of its paper by the St. Louis Post-Dispatch was a change of "process" within the meaning of the above paragraph requiring ninety days notice to plaintiff before the defendant entered into the contract and sale to the Post-Dispatch. Quite simply, in the ordinary everyday understanding of language, Paragraph 3 read as a whole, does not contemplate the event that gives rise to plaintiff's claim. While it seems obvious that the words "process, machinery or equipment" in the context in which that phrase is used refer only to types of mechanical equipment employed for mail room work, any doubt as to that interpretation is plainly resolved by the subsequent statements:

> "Such notice shall be given at least ninety days **before installation** is to be made. The manner of **operating the machines** shall be determined by a joint committee representing the parties to the contract." (Emphasis supplied.)

If the parties did not agree, the matter was to be referred to arbitration conditioned on the agreement that none but plaintiff's members "shall be permitted to work on any such process, machinery or equipment . . ." We conclude as a matter of law that the defendant's sale and contract

with the St. Louis Post-Dispatch was not such a change in process, equipment or machinery contemplated by Paragraph 3 as requiring ninety days notice to plaintiff. Plaintiff urges that a contrary result is compelled by the well-established rules for interpreting labor agreements, citing **Steelworkers v. American Mfg. Co.**, 363 U. S. 564; **Steelworkers v. Warrior & Gulf Co.**, 363 U. S. 574; **Textile Workers v. Lincoln Mills**, 353 U. S. 448; **Teamsters Local v. Lucas Flour Co.**, 369 U. S. 95; **Dowd Box Co. v. Courtney**, 368 U. S. 502. We recognize the general principles there enunciated for interpreting collective bargaining agreements in the fashioning of federal substantive law for the enforcement of labor agreements. Nonetheless, we think it equally clear that in each case the decision rests on the terms of the collective bargaining agreement, compare, for example, **Atkinson v. Sinclair Refining Co.**, 370 U. S. 238, with **Drake Bakeries v. Bakery Workers**, 370 U. S. 255. As said in **Atkinson v. Sinclair Refining Co.**, supra, at 241:

> "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. 'The Congress . . . has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.' **United Steelworkers v. Warrior & Gulf Nav. Co.**, 363 U. S. 574, 582. See also **United Steelworkers v. American Mfg. Co.**, 363 U. S. 564, 570-571 (concurring opinion). We think it unquestionably clear that the contract here involved is not susceptible to a construction that the company was bound to arbitrate its claim for damages against the union for breach of the undertaking not to strike."

Of course, we are not instantly concerned with a breach of a promise to arbitrate, but rather with the alleged breach of a promise to give ninety-days notice before installation of a change of process, machinery or equipment affecting mail room work. Undoubtedly, the sale and contract under which the St. Louis Post-Dispatch would print and distribute defendant's newspaper affected mail room work, but we are unable to find in Paragraph 3 a promise that ninety days in advance of a sale of its property and a contract for its printing, defendant would give plaintiff notice of its intention. It is undoubtedly true that upon the happening of that event, plaintiff's members' rights under the agreement were arbitrable, but the parties waived arbitration and proceeded to litigate the issues in the state court and those questions are decided with finality.

Plaintiff states that the "obvious purpose of this contractual requirement (ninety days notice) was to allow plaintiff Union an opportunity to thoroughly study and prepare itself for any such change, or conversely, to allow the Union ample opportunity to object to and/or reject the employer's proposal. Had this ninety-days notice provisions been complied with by defendant prior to the sale of the Globe building and hardware, there would not have been litigation arising out of this change in process.

"Throughout these past five years the differences of opinions between the employer and employees, asserting themselves through their Union, would have been resolved through the system of self-government built into the contract between these parties. The common law of the newspaper industry would have applied." This argument is self-defeating. Had the plaintiff timely sought to compel arbitration with respect to the meaning and interpretation of Paragraph 3 of the collective bargaining agreement, this Court would have so directed and the common law of the newspaper industry would have been applied by the arbi-

tration board as provided for in the parties' contract. **United Steelworkers v. Warrior & Gulf Nav. Co.**, supra. But here the parties waived arbitration of the individual employees rights under the agreement and litigated those issues in the state court. The amended petition on which the case in the state court was tried stated that every member of the plaintiff joined in the action and that the sixty-two plaintiffs brought their action individually and collectively. In the instant petition plaintiff alleges that it was compelled to bring and maintain the state court action on behalf of the employees affected. While it would appear that the principles of res judicata or the proscription against splitting a cause of action may well, on the basis of the state court action, be applicable to plaintiff's claim for damages to it as a union, we do not decide that issue because questions as to whether the union or individual members thereof might maintain an action under § 301 of the Labor Management Relations Act and on whether such actions may be heard in state court proceedings were, during the pendency of plaintiff's members' state court action, largely unresolved by the growing pains of fashioning federal substantive law. See for example **Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.**, 298 F. 2d 277, and the district court decisions there affirmed, 187 F. Supp. 509 and 183 F. Supp. 568, together with **United Shoe Workers of America, AFL-CIO, et al. v. Brooks Shoe Manufacturing Company et al.**, 191 F. Supp. 288. The Supreme Court has now removed the "underpinnings" of **Employees v. Westinghouse Corp.**, 348 U. S. 437, which denied the right of the union to sue for the benefits inuring to its individual members. **Smith v. Evening News Assn.**, 371 U. S. 195; **Truck Drivers Union v. Riss & Co.**, 372 U. S. 517. It has also now been determined that § 301 of the Labor Management Relations Act does not deprive state courts of jurisdiction to enforce collective bargaining agreements but requires them to apply federal labor law whether brought by the union or its individual

members. **Teamsters Local v. Lucas Flour Co.**, supra, and **Dowd Box Co. v. Courtney**, supra.

Even if the defendant's sale and printing contract were a change of "process, equipment, or machinery" within the contemplation of Paragraph 3, the ninety-days notice required is in advance of "installation" and even if "installation" is read as the date that the change is to be effected, there is nothing forbidding such installation, except that the parties would be bound by the arbitrator's decision on the question. On the instant facts, the sale and contract was announced on February 27, 1959. The changes envisioned thereby were to become effective "if and when the Guild strike is settled". The Guild strike ended on June 1, 1959, some ninety days after the announcement. It is obvious plaintiff had ample opportunity to negotiate and arbitrate with respect to the rights of its individual members before the effective date. It did so negotiate and waived the arbitration provisions of the collective bargaining agreement and determined to litigate the issues. Therefore, even if Paragraph 3 were subject to the interpretation placed on it by plaintiff, defendant gave what turned out to be ninety-days notice and could not be said to have breached a contractual promise.

Plaintiff suggests that the Court consider the current N. L. R. B. attitude and policy in regard to the obligation of a company to bargain in subcontracting and plant shutdown decisions as reviewed and set forth in "The Duty to Bargain About Changes in Operations", Raymond Goetz, Duke Law Journal, Vol. 1964, Winter, No. 1.

This very interesting article pertains to an analogous matter concerning the unilateral decision of an employer to subcontract work as an unfair labor practice under § 8 (a) (5) and 8 (d) of the National Labor Relations Act, 29 U. S. C. A. 158, which has been committed to the jurisdiction of the National Labor Relations Board. This

Court's jurisdiction is based upon the enforcement of the provisions of the collective bargaining agreement in the process of fashioning federal substantive law under § 301 of the Labor Management Relations Act. It is not the designated authority for determining statutory unfair labor practices. The same acts may give rise to both an unfair labor practice under § 8 of the National Labor Relations Act and to a claim for damages under § 301 of the Labor Management Relations Act without displacing or destroying the jurisdiction of either Court or Board:

> "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301. . . . If, as respondent strongly urges there are situations in which serious problems will arise from both the courts and the Board having jurisdiction over acts which amount to an unfair labor practice, we shall face those cases when they arise." **Smith v. Evening News Assn.**, 371 U. S. 195 at 197.

See also **Teamsters Local v. Lucas Flour Co.**, supra, and **Carey v. Westinghouse Corp.**, 375 U. S. 261.

Nonetheless, assuming that decisions reviewing N. L. R. B. orders should be employed in the present circumstances to imply a provision in a collective bargaining agreement where none in fact exists, an assumption we very much doubt because of different criteria for determining unfair labor practices, we turn to the 8th Circuit Court of Appeals in **N. L. R. B. v. Adams Dairy, Inc.**, 322 F. 2d 553, as controlling authority:

> ". . . the decision on the part of Adams to terminate a phase of its business and distribute all of its products through independent contractors was not a required subject of collective bargaining. After that decision had been made, however, § 8 (a) (5) did require negotiation with reference to the treatment of employees who were terminated by the decision."

That decision does not lead to a contrary result or suggest that the Court supply a provision not contained in the agreement.

Plaintiff's motion for partial summary judgment will be denied. The motion of defendant for summary judgment will be sustained and judgment will issue for defendant.

Dated this 12th day of June, 1964.

/s/ James H. Meredith,
United States District Judge.

## APPENDIX B.

### UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

---

### Opinion.

---

Filed September 15, 1965.

---

Before VOGEL and BLACKMUN, Circuit Judges, and REGISTER, District Judge.

---

BLACKMUN, Circuit Judge

St. Louis Mailers' Union Local No. 3 is a union of mail room employees in the St. Louis, Missouri, area affiliated with the International Typographical Union. For the two year period ending August 14, 1960, the Local was the exclusive bargaining agent for the mailer employees of the Globe-Democrat Publishing Company, publisher of the Saint Louis newspaper known as the Globe-Democrat. The Local instituted this action against Globe in the Eastern District of Missouri in August 1963. It was brought under § 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185,[1] and rests upon a claimed viola-

---

[1] § 185. Suits by and against labor organizations—Venue, amount and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

. . .

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organ-

tion of the bargaining agreement between the Local and St. Louis Newspaper Publishers' Association. Both compensatory and punitive damages are sought. The Association consists of the Globe and The Pulitzer Publishing Company, publisher of the Saint Louis newspaper known as the Post-Dispatch.

After Globe filed its answer both sides moved for summary judgment. The Local's motion was directed to the claimed breach of contract, with the determination of damages to be deferred for trial, as permitted by Rule 56(c), Fed. R. Civ. P. Globe's motion was on the theory that the facts showed no breach of contract and that principles of res judicata provided a barrier. Judge Meredith denied the Local's motion and sustained Globe's. His supporting memorandum is reported at 233 F.Supp. 529 (E.D. Mo. 1964). Judgment was entered accordingly.

Globe, for the first time in this litigation, now suggests that neither the complaint, as last amended, nor the record fulfills the requirements for district court jurisdiction set forth in § 301(c), 29 U.S.C. § 185(c), because it is not alleged or proved that the plaintiff Local maintains its principal office in the Eastern District of Missouri, or that its authorized officers or agents "are engaged" in representing or acting for employee members. It points out that the complaint was filed in August 1963 and that it alleges the Local's representation of employees only for a period prior to August 14, 1960; thus, it says, there is no allegation that, at the time the suit was filed, officers and agents of the Local were engaged in the District in representing employees.

The complaint as amended could have been more specific in its jurisdictional allegations. However, viewing the

---

ization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

. . .

complaint in its entirety, we feel that the Local's Saint Louis principal office location was sufficiently asserted and without misunderstanding on Globe's part or prejudice to it. Further, looking at the statute's alternative language, we appreciate the fact that literally it speaks in terms of present representation by officers or agents. We are of the opinion, nevertheless, that it was not the intent of Congress to deny and take away jurisdiction over past contract violations at the moment representation ceases. We relate the language of the statute, instead, to representation at the time of the alleged contract violation. Accordingly, under both clause (1) and clause (2) of § 301(c), we uphold the district court's jurisdiction. Cf. **International Ass'n of Machinists v. International Aircraft Services, Inc.**, 302 F.2d 808, 815-16 (4 Cir. 1962).

Apart from the secondary question of damages there is no genuine issue as to any material fact:

The bargaining agreement between the Local and the Publishers' Association was executed in December 1958 and was applicable to the period from August 15, 1958, through August 14, 1960. It recited the Association's recognition of the Local "as the exclusive bargaining representative of all employees covered by this contract". In the preamble the publishers agreed that no employee may be required to cross a picket line established because of a strike when the line is authorized by the International. Article I was entitled "Jurisdiction". By it the publishers bound themselves to employ only journeymen and apprentices to perform all mail room work. A general description of this work was set forth. The contract then provided that mailers "shall do all of the work necessary in the ordinary maintenance, cleaning and operating adjustments of all machines in use in the mail room." Paragraph 3 of Article I then read in its entirety:

> "3. In the event of the introduction of any process, machinery, or equipment affecting mailing room work

as herein defined not in use at the date this contract is effective or any such process, machinery or equipment used as an evolution of or substitute for current processes, machinery or equipment, the Publisher shall notify the Union of that fact, specifically describing it. Such notice shall be given at least ninety days before installation is to be made. The manner of operating the machines shall be determined by a joint committee representing the parties to the contract. Upon failure to agree upon the points involved, the matter shall be referred to arbitration as herein elsewhere provided. It is mutually agreed that in submitting this question to a fifth man, he shall be governed by the agreement of the parties that none but journeymen, as defined in this contract, shall be permitted to work on any such process, machinery or equipment, except as provided elsewhere in this agreement for the training of apprentices."

Article III contained provisions for the "final and binding" arbitration of any dispute as to "the interpretation or enforcement of any of the provisions of this contract."

On February 21, 1959, the St. Louis Newspaper Guild, which was the bargaining representative for Globe's employees in editorial, business, and maintenance classifications, and which was separate and distinct from the plaintiff Local, struck Globe's plant and erected a picket line. The line remained until the Guild strike was settled about May 27. The Local's Globe members, as permitted by the bargaining agreement's preamble to which reference has been made above, refused to cross this picket line. They took employment elsewhere. The publication of the Globe-Democrat was resumed only on June 1, 1959.

On or before February 27, 1959, during the period covered by the bargaining agreement, Globe and Pulitzer, unknown to the Local, negotiated and entered into a con-

tract. By this agreement Globe conveyed its building to Pulitzer and sold Pulitzer the bulk of its mechanical equipment, including all mail room equipment theretofore used by Globe and operated by the Local's members in the Globe plant. Thereafter, when Globe resumed publication, Pulitzer performed the printing and distribution of the Globe-Democrat and all of what was formerly Globe's mail room work.

On February 27, 1959, Globe's president called a meeting of representatives of all its mechanical crafts, including the plaintiff Local, and read them a statement disclosing the contract with Pulitzer and the consolidation of the mechanical operation of the two newspapers "when and if the Guild strike is settled." The statement also recited that, to the extent possible, "Members of the mechanical unions will be employed on a priority basis in the consolidated mechanical operation. If they all cannot be employed, the dismissal provisions of the current mechanical contracts will apply." A copy of this statement had been sent to each employee represented by the Local.

After February 27 the Local "froze" the "Priority Board" at the Post-Dispatch and members taking employment there remained in the capacity of extras and acquired no priority standing until sometime after June 1, 1959. Those former Globe employees who did not obtain positions with Pulitzer could have done so had they wished.

It is well at this point to note certain Missouri state court litigation which emerged from the same fact situation. The Globe members of the Local, waiving the arbitration provisions of the bargaining agreement, sued Globe in the Circuit Court of the City of Saint Louis for vacation pay and severance pay and for statutory penalties under V. A. M. S., § 290.090. The same counsel on both

sides appeared in that case as in this one and the Local paid the expenses of the suit on behalf of its members. The state trial court entered judgment for the plaintiffs for vacation pay but denied their claims for severance compensation and for the statutory penalties. Globe did not appeal. The members did appeal from those portions of the judgment adverse to them. The Supreme Court of Missouri affirmed. **Monterosso v. St. Louis Globe-Democrat Publishing Co.**, 368 S. W. 2d 481 (Mo. Sup. 1963), cert. denied 375 U. S. 908. The court held that there was no "consolidation" of the Globe and Pulitizer within the meaning of the severance pay provisions of the collective bargaining agreement.[2] Companion cases, decided the same day, concerned the rights of members of other unions to severance or dismissal pay under their respective bargaining agreements. **Irwin v. Globe-Democrat Publishing Co.**, 368 S. W. 2d 452 (Mo. Sup. 1963), cert. denied 375 U. S. 908; **Allen v. Globe-Democrat Publishing Co.**, 368 S. W. 2d 460 (Mo. Sup. 1963); and **Ackerman v. Globe-Democrat Publishing Co.**, 368 S. W. 2d 469 (Mo. Sup. 1963), cert. denied 375 U. S. 949. In each of those appeals the union members' respective claims were rejected.

---

[2] We venture no opinion as to the outcome of this severance and vacation pay case had the plaintiffs not waived arbitration or had Globe questioned the jurisdiction of the Missouri court and had it not failed to suggest the existence of a federal standard before its motion for rehearing to the Missouri Supreme Court, pp. 489-90 of 368 S. W. 2d. See *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965). Globe, however, did not raise the issue and did not appeal and, as the district court in the present litigation stated in its pretrial order, "The parties agreed at the time this dispute [Monterosso] arose to waive the arbitration of provisions of the collective bargaining agreement". Inasmuch as the duty to arbitrate is a matter of contract and the parties may exclude a subject from the reach of arbitration, *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238, 241 (1962); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582 (1960), a right to arbitrate may certainly be waived by the parties. *Armstrong-Norwalk Rubber Corp. v. Local 283, United Rubber Workers*, 167 F. Supp. 817, 819 (D. Conn. 1958), appeal dismissed, 269 F. 2d 618 (2 Cir. 1959).

We cite **Monterosso** and its companion state court cases to emphasize (a) the fact that the litigation presently before us does not concern individual rights of the Local's members and has to do with nothing more than the Local's own asserted claim as a union, and (b) the fact that any arbitration provision of paragraph 3 of Article I concerning members' rights was bypassed by the election of all Globe members to press their claims in state court litigation. The district court in its pretrial order observed, "The parties agreed and stated to the Court" that the "individual rights, under the collective bargaining agreement, of plaintiff's members who formerly were employed by defendant are forever foreclosed by the judgment in **Monterosso**. . . ." The present suit was instituted only after the Supreme Court of Missouri had decided the **Monterosso** case.

The Local's sole contention, as the case now comes to us, is that the Globe-Pulitzer agreement amounted to the introduction of a "process" affecting mail room work, within the meaning of Article I, paragraph 3, of the bargaining agreement; that, under that contract, this change necessitated 90 days' advance notice to the Local; that such notice was not given; and that the failure to give it constituted a breach of the agreement as a matter of law. and entitled the Local to damages. It is said that when Globe arranged for Pulitzer to print and distribute the Globe-Democrat, Globe no longer controlled any processes of its mail room; that, indeed, it resulted in a total abandonment of all such processes; and that the change was certainly an "introduction" of a process or an "evolution of or substitute for current processes".

This argument is not an illogical one. It does not persuade us, however, for the following reasons:

1. The term "process", as employed in the bargaining agreement, does not strike us as one which was intended

by the parties to embrace the fact situation present here. The word itself, of course, is broad and not specific. It possesses and is capable of many meanings. A glance at any dictionary, law or general, discloses this. See, also, 34 Words and Phrases, "Process", pp. 225-33 (1957). Three cases cited to us by the Local also demonstrate the word's capacity: **Kalee v. Dewey Products Co.**, 296 Mich. 540, 296 N. W. 826, 827-28 (1941); **Nielsen v. Firemen's Fund Indem. Co.**, 239 App. Div. 239, 268 N. Y. S. 189, 191 (1933); and **Bedford v. Colorado Fuel & Iron Corp.**, . . . Colo. . . ., 81 P. 2d 752, 757 (1938), where the court quoted from **Cochrane v. Deener**, 94 U. S. 780, 788 (1876). But the word "process" here appears no less than four times in paragraph 3 and each time it is coupled with "machinery or equipment". We relate the word, as did the district court, pp. 531-32 of 233 F. Supp., not to every conceivable mode of acting, but, instead, only "to types of mechanical equipment employed for mail room work". What the parties contemplated were changes and substitutions in operating procedures which would affect the nature and method of the mailer employees' work. Nothing of this kind is involved here.

2. We also join Judge Meredith in being impressed by the fact that paragraph 3, in its reference to notice, speaks of "before installation" and of "the introduction of any process". These phrases are directed to continuing activity and to changes in working and operating conditions and not to a cessation of mailing room function. Further, the phrase does not relate to the 90 days before arriving at a decision; it concerns only the 90 days before installation.

3. Paragraph 3 is a part of that article of the bargaining agreement which has to do with the local's jurisdiction, that is, the retention of all Globe's mailing room work for the Local's own members. The first two para-

graphs of Article I clearly reveal the union's concern as to this and the parties' intent that the work in the Globe mailing room, even including ordinary maintenance, cleaning and operating adjustments, be restricted to members of the Local. Paragraph 3 speaks of "evolution of or substitute for current processes, machinery or equipment". Arbitration is to govern "the manner of operating the machines". And the paragraph concludes with the seemingly redundant provision that even the fifth arbitrator shall bear in mind that only journeymen shall be permitted to work on the process. All this emphasizes that the parties were primarily concerned with the retention of the Local's jurisdiction over the mail room.

4. After the effectuation of the Globe-Pulitzer agreement, mail room jurisdiction was still preserved for the Local. It lost nothing jurisdictionally, for Pulitzer as well as Globe was a member of the Publishers' Association, the employer party to the bargaining agreement, and the employee who now worked for Pulitzer had the benefits of the very same bargaining agreement.

We therefore conclude that paragraph 3 of Article I and its 90 day notice provision do not have application to the fact situation here.

However, even if we are not correct in the foregoing conclusion, the Local encounters the barriers of the actual existence of 90 days' notice to it and its inaction after that notice. On February 27, 1959, Globe's president called the meeting with representatives of the Local and of all other mechanical crafts. These representatives, as the Local concedes, were then advised of the deal with Pulitzer, of Pulitzer's forthcoming printing of the Globe-Democrat, and of the consolidation of the mechanical operations when the Guild strike was settled. This settlement was effected at the end of May and Globe resumed publication June 1. The ninetieth day after February 27

was May 28. Thus, more than 90 days elapsed between the February meeting and the resumption of publication. During that entire period the plaintiff Local did nothing about activating a joint committee of the kind contemplated by paragraph 3.

The union would overcome these facts by arguing that, under **Fibreboard Paper Products Corp. v. NLRB**, 379 U. S. 203, 216, footnote 10 (1964), the 90 day notice must be given before the accomplished fact of the Globe-Pulitzer agreement, and that, without such anticipatory notice, Globe assumed the risk of the status quo ante being forceably restored. But **Fibreboard**, and our own case of **NLRB v. Adams Dairy, Inc.**, 322 F. 2d 553 (8 Cir. 1963), certiorari granted and case remanded for reconsideration in the light of **Fibreboard**, 379 U. S. 644 (1965), decision reaffirmed, . . . F. 2d . . . (8 Cir. 1965), concerned the unfair labor practice aspect of a decision to contract out work. This appeal, as the Local itself characterizes it, is limited "to the issue of contract breach." There is no unfair labor practice issue before us. See **Fibreboard Paper Prod. Corp. v. East Bay Union of Machinists**, 344 F. 2d 300, 304 (9 Cir. 1965).

We are not unaware of the developing emphasis on arbitration as a stabilizing factor in effectuating national labor policy. In **Bonnot v. Congress of Independent Unions**, 331 F. 2d 355, 357-58 (8 Cir. 1964), we observed this and cited and reviewed **United Steelworkers of America v. American Mfg. Co.**, 363 U. S. 564 (1960) its companion cases, and many others. To that list may now be added **Republic Steel Corp. v. Maddox**, 379 U. S. 650 (1965) and **Minnesota Joint Bd., Amalgamated Clothing Workers v. United Garment Mfg. Co.**, 338 F. 2d 195 (8 Cir. 1964). The basic question is the meaning and intent of the contract. That question is resolved here adversely to the Local's contentions.

This makes it unnecessary for us to pass upon the further point raised by Globe, namely, that the plaintiffs in **Monterosso** and the plaintiff in the present action are, in effect, identical or, if not, that the Local participated in the state court action so that, in either event, the present suit is barred by principles of res judicata and election of remedies.

Affirmed.

## APPENDIX C.

### Petition for Rehearing.

(Filed in 8th C. C. A. on Sept. 21, 1965.)

The Appellant respectfully petitions this Honorable Court for a rehearing of the appeal in this cause, and in support of this petition represents to the Court as follows:

Appellant reserves its argued position as to each of the points of appeal. In this petition Appellant-Union addresses itself solely to that feature of this court's decision wherein it believes that the Court may be convinced that the result herein is based upon an erroneous application of the federal law in the District Court and also in this Court.

Therefore this petition is devoted to convincing this Court that the facts and the record herein are adequate to establish that the Appellant is entitled to relief as prayed in the Reply Brief for Appellant on page 3.[1]

The United States Supreme Court in the case of Republic Steel Corporation v. Maddox, 379 U. S. 650 and this court in the case of Minnesota Joint Bd., etc. v. United Garment Mfg. Co., 338 F. 2d 195 (8 Cir. 1964), have rigidly affirmed that arbitration clauses in a labor agreement bind the parties to the agreement to the use of the arbitration remedy in the event of a dispute between the parties arising out of the interpretation of the agreement. These two decisions were not published until after the Appellant's appeal brief had been printed and filed with this court. Both cases were included in Appellant's Reply Brief as authority for the Appellant's prayer that this court "make and enter any orders necessary to allow the parties to commence to bargain" (Reply Brief for Appellant, Appendix A).

---

[1] The relevant portion of the Appellant's Reply Brief is set out as Appendix A to this petition for rehearing.

The parties to this litigation have never waived their respective rights to arbitrate this dispute under the provisions of the labor agreement (R. pages 10 and 11, Exhibit "A", Article III, Disputes and Discharges).[2]

This Court has determined that a dispute exists between these parties regarding the interpretation or enforcement of a provision of their contract. Once this determination was made by this Court the Federal Labor Law compels this Court to Order this dispute into arbitration as provided by the labor agreement.

(a) This court has made itself the Arbitrator in its opinion and has made findings regarding the interpretation of clauses in the contract, the interpretation of a notice agreement set out in the contract and the application of these provisions to the dispute of these parties.

The Court has found that there is no legal relationship between an unfair labor practice issue and an issue of contract breach. This Court has thus distinguished this case from the cases of Fibreboard v. N. L. R. B., 379 U. S. 203, and N. L. R. B. v. Adams Dairy, Inc., 350 F. 2d 108 (8th Cir., September 8th, 1965). The federal common law of labor relations has fully established that a controversy between an employer and its employees and/or their bargaining representative can simultaneously constitute a litigable breach of contract and/or an unfair labor prac-

---

[2] This court remained preoccupied throughout its opinion with the fact that the referenced state court litigation, i. e., Monterosso, et al. v. Globe-Democrat, 368 S. W. 2d 481, certiorari denied 375 U. S. 908, resulted from a "waiver" of arbitration rights. Plaintiff now unequivocably states that this prior waiver of arbitration by its individual members in the Monterosso litigation is irrelevant to any issue in this litigation and, further, these individual union members never had any right to invoke the arbitration processes of their contract inasmuch as those rights are exercisable only by the union (this Plaintiff-Appellant) itself. See Republic Steel v. Maddox, 85 S. Ct. 614 at 616 (R. pg. 10, Exhibit "A", Article III, Paragraph 2).

tice. See Fibreboard Paper Prod. Corp. v. East Bay Union of Machinists, 344 F. 2d 300, 304 (9th Cir. 1965). The District Court below used the prior decision of this Court in N. L. R. B. v. Adams Dairy, Inc., 322 F. 2d 553, as "controlling authority" (R. 64, District Court's Memorandum Opinion) in arriving at its decision in this case. The legal principles upon which a finding of an unfair labor practice and a finding of contract breach are made can and do arise out of identical sections of the National Labor Relations Act.

In conclusion, Appellant prays that this Court reconsider its decision herein only to the extent that the Court finds an arbitratable issue between the parties and then orders the parties to resolve this dispute by the means they had previously agreed upon to be used for the resolution of disputes. The common law of the newspaper industry would thus be invoked to determine this dispute as provided by the Congress and incorporated into the federal common law of labor relations.

For the foregoing reasons Appellant respectfully prays that this petition for rehearing be granted.

(The following excerpt is re-printed from pages 2 and 3 of Appellant's Reply Brief filed on February 17, 1965 and is identified as Appendix A.)

In order that this Court may clearly understand the position of the Union in this case and to emphasize to our worthy adversary that we do not claim any right herein "under the guise of an euphemism" (Appellee's Brief, page 15, first full paragraph), the summation of the Union's reply is this:

1. There is an unresolved dispute between these parties arising out of their failure to agree over the interpretation of a labor-agreement.

2. Neither party has legally waived its duty to arbitrate this dispute as provided by the agreement.

3. During the time that this dispute has remained unresolved the federal labor law has provided the jurisdictional basis of this action as well as a workable solution:

(a) Fiberboard Paper Products v. N. L. R. B., 85 S. Ct. 398;

(b) Minnesota Joint Board, etc. v. United Garment, etc. (supra);

(c) Republic Steel Corp. v. Maddox, 85 S. Ct. 614.

4. This Union is ready, willing and able to enter into arbitration of this dispute.

(a) The "status quo ante" must be restored.

5. The basis of this dispute is a subject of mandatory bargaining.

6. All provisions of the labor agreement (Exhibit "A") for setting up arbitration are still available to the parties.

The Union so prays that this Court make and enter any Orders necessary to allow the parties to commence to bargain.

BLANK
PAGE

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
NOV 1 2 1965
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

Civil.
No. 715

ST. LOUIS MAILERS' UNION LOCAL NO. 3,
Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY, a
Missouri Corporation,
Respondent.

## BRIEF

**Of Respondent, Opposing Grant of Certiorari.**

LON HOCKER,
411 North Seventh Street,
St. Louis, Missouri,
Attorney for Respondent.

HOCKER, GOODWIN & MacGREEVY,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

BLANK
PAGE

## INDEX.


| | Page |
|---|---|
| Statement of the case | 1 |
| Summary of argument | 3 |
| Argument | 4 |


### Cases Cited.


| | |
|---|---|
| Essington v. Parish, 164 F. 2d 725 | 7 |
| Monterosso et al. v. St. Louis Globe-Democrat Publishing Company, 368 S. W. 2d 481 | 2 |
| Perego v. Dodge, 16 S. Ct. 971, 163 U. S. 160, 41 L. Ed. 813 | 6 |
| U. S. v. Candelaria, 271 U. S. 432, 70 L. Ed. 1023, 46 S. Ct. 561, 564 | 5 |


### Miscellaneous Cited.


| | |
|---|---|
| S. Ct. Rule 19, 1 (b) | 5 |
| S. Ct. Rule 23, 1 (c) | 4 |

BLANK
PAGE

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

Civil.
No. .....

ST. LOUIS MAILERS' UNION LOCAL NO. 3,
Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY, a
Missouri Corporation,
Respondent.

## BRIEF

**Of Respondent, Opposing Grant of Certiorari.**

### STATEMENT OF THE CASE.

We adopt the petitioner's statement of the case, which is correct and fair as far as it goes. However, we add the following facts:

Notice of the contract to print the Globe-Democrat by Pulitzer Publishing Company, effective when the pending strike was settled, which the petitioner's complaint claims to have been violative of the labor agreement, was given to the members of the plaintiff's union who were employees of the Globe-Democrat by mail on the day the contract was executed, February 27, 1959, and a copy of the notice was read to representatives of the plaintiff union in person on the same day (R. 38). During the more than ninety days between the giving of this notice and the resumption of publication, June 1, 1959 (R. 37),

the union did not carry out (R. 67) the procedure leading to the arbitration of a dispute under the contract (R. 10).

Instead, suit was filed in the Circuit Court of the City of St. Louis entitled "Monterosso et al. v. St. Louis Globe-Democrat Publishing Company" for damages on account of the alleged violation of the dismissal pay provisions of the same contract which is in dispute here (Sup. R. 1, et seq.), in which plaintiff alleged:

> "In this regard plaintiff states that each and every other member of the labor organization of which he is a member does by leave join in this action as a party plaintiff."

The joining plaintiffs in the Monterosso suit (Sup. R. 7, 8, 9) are identical with the persons named as beneficiaries of the present suit (R. 1, 29). One of the items claimed in this action as damages to the union was as follows (R. 4):

> "Further, Plaintiff as a direct and proximate result of Defendant's breaches were caused to expend monies for attorney's fees and expenses in the prosecution of litigation on behalf of its individual members against Defendant, 'Globe', in their individual attempts to collect vacation credits and severance pay in the amount of $6,000.00, said members being identified in Exhibit 'B' hereto attached."

It was agreed by the parties and recorded in the pretrial order (R. 55):

> "4. The parties agreed at the time this dispute arose to waive the arbitration of provisions of the collective bargaining agreement. Thereafter the matters in issue were litigated in the state court action and after the state court litigation was completed, this suit was filed in the United States District Court."

The outcome of the Monterosso case is reported at 368 S. W. 2d 481 (Sup. R. 1).

## SUMMARY OF ARGUMENT.

The question stated at page 2 of petitioner's petition for certiorari is not presented by the record of this case because:

1. The lower courts did not "arbitrate" a dispute between the parties—they adjudicated the only claim brought by plaintiff, i. e., for money damages for breach of contract.

2. The "mandatory" arbitration provision in the parties' contract was not only not invoked by the plaintiff —it was waived, both by necessary implication and expressly.

## ARGUMENT.

1.

Petitioner states that the following question is presented (Petition, p. 2):

> "Can a federal court arbitrate and decide a contract dispute between a company and a union when the labor agreement between the parties contains a mandatory arbitration provision?"

Correspondingly, petitioner defines the relief sought here in these words (Petition, p. 7):

> "The petitioner is entitled to have the dispute herein resolved by invoking the common law of the newspaper industry through the enforcement of the mandatory arbitration method by which these parties agreed to resolve their disputes. We ask this court to enforce that right."

The question might be a proper one for decision, and the relief sought might be appropriate in some other case, but the question stated is not and cannot be "expressed in the terms and circumstances" of the record presented by this case [S. Ct. Rule 23, 1 (c)], and the relief sought here could not be afforded under petitioner's own pleadings below.

This application is drafted as if the union, after properly invoking arbitration (Contract, Art. III, R. 10), and assuming a refusal by the Globe-Democrat to arbitrate, had brought an action in the United States District Court to compel arbitration under 29 U. S. C. A. 185, subject to the defenses of laches, limitations, waiver, estoppel, election of remedies, etc.

But this is simply not such an action. It is an action to recover money damages (R. 4), including punitive damages (R. 5) aggregating $6,002,000.00 (R. 5) for breach of

the contract in three specified respects (R. 2, 3), *none of which was a refusal to arbitrate.*

The courts below adjudicated the claim which petitioner, as the plaintiff below, brought to court. No error is charged in the adjudication itself; error is claimed only in that the courts failed to adjudicate another claim, not brought.

As nearly as we make it out, then, petitioner's reason for seeking the writ is that the court below should have redrafted the complaint petitioner filed, should have recast the stipulation of facts petitioner submitted, and should have granted relief which petitioner **did not pray** for.

This is not such a reason for the writ as is contemplated by Rule 19, 1 (b) of this court.

2.

Petitioner with commendable frankness proclaims that up until the time that it filed its Reply Brief in the Appellate Court it had always treated this litigation as a suit for money damages for breach of the manning provisions of the labor contract (R. 6), which is what is reflected by the complaint (R. 2, 3), the decision of the District Court (Pet., p. 9), and the opinion of the Court of Appeals (Pet., p. 19). Petitioner states that in its Reply Brief in the Court of Appeals it " 'shifted gears' in this litigation and prayed for the enforcement of the mandatory arbitration clause by the Appeals Court" (Pet., p. 6). Some shift: from high to reverse! The doctrine of res adjudicata in the Monterosso suit was raised as a defense to the claim pleaded in the District Court by the petitioner, on the theory that the petitioner by prosecuting the claim of its members (R. 50, 51) had control of the litigation, or at the very least participated in it, and therefore is bound by its outcome. U. S. v. Candelaria, 271 U. S. 432, 70 L. Ed. 1023, 46 S. Ct. 561, 564. The District Court never reached

this contention, since it determined that there was not shown as a matter of law any breach of the contract provision (Pet. p. 15). But whether or not there was an election of remedies at the time the Monterosso suit was filed, there was certainly an election made by this plaintiff when the complaint *in this case* was filed. At that time the union sought to enforce its rights by litigation. This is incompatible with the position taken now that these rights must be enforced by arbitration. One cannot litigate and lose on the merits and then assert that he as plaintiff should have gone to another court. Perego v. Dodge, 16 S. Ct. 971, 163 U. S. 160, 41 L. Ed. 813.

Accordingly, this petitioner is forbidden from "shifting gears" not only by its action in supporting the state court litigation, but by its action in instituting this litigation. It is in effect seeking to have three bites at the same apple.

Nowhere in the record of this case is there the slightest suggestion that the union has at any time sought to invoke the procedures leading to arbitration under the contract. Quite naturally there is no corresponding allegation that the Globe-Democrat had ever refused to arbitrate. Neither of these requisite facts is incorporated in the stipulation on which both this suit and the Monterosso suit was submitted (R. 55, 36). The very purpose of the ninety-day provision in the contract respecting notice of a change in process which was the subject of dispute (Par. 5b, R. 3) is to give time to permit resolution of the dispute by arbitration before the manning of the new "process" should commence (R. 8, 9). Thus the parties have set their own statute of limitations, or, one might say, the period in which laches will be deemed to have run. The contract complained of was executed (R. 2), and notice thereof given February 27, 1959 (R. 38). It became effective, and manning commenced June 1, 1959 (R. 39). This is November, 1965, six years and five months later. So far at least as the record discloses, no effort has been made *to this date* to initiate arbitration of this dis-

pute. The first hint of the claim of such a right was, as petitioner concedes, in its Reply Brief in the Court of Appeals filed February 17, 1965, six years after the contract (Pet. 6). This suggestion was made after years of litigation, fostered or brought by this petitioner in all of which, in all courts, it was unsuccessful.

In electing to submit its claim for decision to a court,—indeed not to one court, but two,—it waived by necessary implication the right to have the same claim decided by arbitration.

Essington v. Parish, 164 F. 2d 725.

But more than this, in order to prevent the employer from aborting the assertion in court of the union's disputed claims by insisting upon the arbitration procedure, the claimants, represented by the union, expressly waived arbitration. The pre-trial order below, to which petitioner has not excepted, recites (R. 55):

> "The parties" [the *Federal Court* parties, the Union and the Globe] "agreed and stated to the Court the following which is hereby ordered incorporated into the record for consideration on the cross motions for summary judgment:
>
> * * * * * * * *
>
> "4. The parties agreed at the time this dispute arose to waive the arbitration of provisions of the Collective bargaining agreement."

It is time that the litigation cease.

Respectfully submitted,

LON HOCKER,
411 N. Seventh Street,
St. Louis, Missouri,
Attorney for Respondent.

HOCKER, GOODWIN & MacGREEVY,
Of Counsel.

BLANK
PAGE

BLANK PAGE.

IN THE

# SUPREME COURT OF THE UNITED STATES.

---

OCTOBER TERM, 1965.

---

No. 715.

---

ST. LOUIS MAILERS' UNION LOCAL NO. 3,
Petitioner,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

---

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

---

St. Louis Mailers' Union Local No. 3, petitioner, prays that this Court grant a rehearing of its order of January 17, 1966, denying this petitioner a writ of certiorari, 86 S. Ct. .... (1966), and that the writ issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled case as prayed for in the petition for writ of certiorari filed herein on November 4, 1965.

## REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. During the time that this petition for certiorari has been pending (November 4, 1965 to January 7, 1966) there has been a final and total clarification by this Court of the national labor policy regarding cases in which a factual issue exists which can be described either as an unfair labor practice or a contract grievance. On December 7th, 1965, this Court handed down its decision in International Union United Automobile Workers, etc. v. Scolfield, et al., 86 S. Ct. 373 (1965). At page 383 this Court ruled: "In short, we think that the statutory pattern of the Labor Act does not dichotomize 'public' as opposed to 'private' interests. Rather, the two interblend in the intricate statutory scheme" (citing Retail Clerks, etc. v. Food Employers Council, Inc., Ninth Circuit, 351 F. 2d 525, Opinion dated October 19, 1965). In addition to the ruling in Scolfield this Court denied certiorari on October 11, 1965, in the case of Fibreboard Paper Products Corporation v. East Bay Union of Machinists, etc. (Facts and Opinion, 344 F. 2d 300, cert. den., 86 S. Ct. 61 (1965)).

The sum and substance of the actions of this Court in the Scolfield and Fibreboard cases is in direct conflict and contradiction with the statement of the Eighth Circuit Court of Appeals in their opinion in petitioner's case (Page 28, petition for writ of certiorari). The Eighth Circuit differentiates between an issue of contract breach and an unfair labor practice in such a way as to erroneously deny that the same factual situation can give rise both to the existence of an issue of contract breach in a suit for specific enforcement of a labor agreement and also an unfair labor practice complaint before the N. L. R. B. If the opinion of the Eighth Circuit Court

of Appeals in petitioner's case is allowed to stand as is, it will create needless doubt and confusion among litigants in the Eighth Circuit because it is a mis-statement of the national labor policy as it is now pronounced by this Court.

2. The obvious mis-statement of the national labor policy made by the Eighth Circuit Court of Appeals (Page 28, petition for writ of certiorari) is further erroneously amplified by its decision in the petitioner's case (petition for writ of certiorari, page 28) wherein the Eighth Circuit Court resolves adversely the petitioner's contention that the dispute between these parties must be ordered into mandatory arbitration as required by the labor agreement between these parties (petitioner's writ of certiorari, page 5, footnote 5). In deciding the issues in this case the Eighth Circuit Court of Appeals has misconstrued an allegation of contract breach as an unfair labor practice and thereby refused to order these parties into arbitration as prayed for by this petitioner. Instead, the Eighth Circuit Court of Appeals made itself the arbitrator and made arbitration findings regarding both the interpretation and enforcement of certain vital provisions of the labor agreement between the parties in direct violation of the national labor policy. This petitioner has thereby been denied the benefit of having its problem with the respondent considered within the common law of the newspaper industry through the mandatory arbitration vehicle agreed to by these parties as the **sole** forum for resolution of all of their contract disputes.

In view of this Court's recent rulings in Scofield and Fibreboard, etc., v. East Bay, etc., the position of the Eighth Circuit Court of Appeals is wholly untenable. The national labor policy formulated by this Court and the other Circuit Courts of Appeal has not been adhered to in the Eighth Circuit.

## CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

.....
JEROME J. DUFF,
Counsel for Petitioner.

### Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

.....
JEROME J. DUFF,
Counsel for Petitioner.

### Certificate of Service.

State of Missouri, }
City of St. Louis. } ss.

I, Jerome J. Duff, of counsel for the Petitioner herein, and attorney of record for the Petitioner in the Court below, depose that on the 10 day of February, 1966, I served four copies of the foregoing Petition for Rehearing on the Respondent, as required by Rule 33, Paragraph 1,

by personally delivering said copies hereof to Mr. Lon O. Hocker, Attorney of Record for the Respondent, in care of the law offices of Hocker, Goodwin and MacGreevy, 411 North Seventh Street, St. Louis, Missouri (63101).

.....

Jerome J. Duff,
Member of the Bar of the United States Supreme Court.